No. 11,917

IN THE

United States Court of Appeals

For the Ninth Circuit

GEORGE H. RICHARDSON,

Appellant,

vs.

THE TRAVELERS INSURANCE COMPANY,

Appellee.

Brief for the Appellant

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Subject Index

Table of Authorities Cited

CASES

STATUTES

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JURISDICTION

This is a suit for reformation of a contract of insurance issued by appellee, The Travelers Insurance Company, a Connecticut corporation, to appellant, a citizen of California, more than twenty years ago.

The jurisdiction of this Court and of the District Court have been properly invoked under Judicial Code, Sec. 24 (28 U.S.C.A. #41), and Judicial Code, Sec. 128 (28 U.S. C.A. #225). Judgment was entered in the District Court in favor of the plaintiff (appellee) on February 26, 1948 (R70). Notice of Appeal was filed March 26, 1948 (R70).

STATEMENT OF THE CASE

George H. Richardson, the appellant, took out a $15,000 life insurance policy (No. 373,735) on September 27, 1916, with annual premiums of $309.75. On December 13, 1918, he took an additional policy (No. 482,573) for $10,000 with annual premiums of $232.40.

Both of these policies, aggregating $25,000, were in full force with the appellee insurance company on December 31, 1926, when appellant, after certain conversations with appellee's officers (R119), dropped the 1918 $10,000 policy No. 482,573, and reduced the 1916 $15,000 policy No. 373,735 to a $10,000 policy with special privileges, bearing the same number (#373,735). The premiums on the reduced 1926 $10,000 policy were $335.60 annually, of which $48.10 was for total permanent disability. Disregarding the $48.10 disability premium, the life insurance rate on the $15,000 1916 policy was $20.35 per $1,000 of insurance, while on the 1926 $10,000 policy the rate was $28.57 per $1,000—an increase of $8.40 per $1,000 of insurance. Both rates were based upon the insured's age in 1916, when the original policy (No. 373,735) was issued.

The application for the 1926 policy was for "$10,000 Ins. Annuity, Age 65 on the Uniform Premium Plan with No. A Disability Provision." Appellee claims that by mis-

take of its officers and scriveners at its home office in Hartford, Connecticut, it issued to appellant its "$10,000 Pension Policy, Age 65" instead. The policy was signed by appellee's President and also by its Assistant Department Secretary (R32).

The only essential difference between its "$10,000 Ins. Annuity, Age 65" policy and its "$10,000 Pension Policy, Age 65" appears to be the figures "$500" in the "Pension" policy (R33) and "$1,000" in its "Annuity" policy (R15). The precise language reading:

> "*Options Available at Age 65.* The insured may select in lieu of all other benefits hereunder, one of the following options to become available upon the surrender of this contract at its anniversary when the insured shall have reached the age of 65, the amount of these options being stated for each *$500* of insurance" etc. (so-called "$10,000 Pension Policy, Age 65") and "for each *$1,000* of insurance" etc., (for the so-called "$10,000 Ins. Annuity, Age 65" policy. (Italics ours.)

There is nothing in the record to show that appellant knew or ever heard of these technical insurance terms prior to the trial of this action, although appellee claims its Life Insurance Rate Manual in force in 1916 (but used in rewriting the 1926 policy) does actually contain such terms. Appellee claims its 1916 Manual rate premium for the "$10,000 Pension Policy, Age 65" was $467.50 per year and $287.50 per annum for its "$10,000 Ins. Annuity, Age 65" policy.

Appellant, in the summer of 1926, became an insurance agent of appellee, soliciting accident policy sales exclusively (R114). He received "on the job" training only

(R116). This training did not include any instruction on how to use the life rate manual (R117). He received no training in life insurance (R103). He received no salary or drawing account but was paid a straight commission of 25% of the premiums for each accident insurance policy he sold (R114-115).

As the California law then read, it was necessary for anyone soliciting or selling any kind of insurance including accident insurance policies, to have an insurance agents license. These licenses were issued upon request of the particular insurance company employing the agent. Such licenses at that time permitted the agent to represent any insurance or surety company and to solicit and sell any and all kinds and types of policies—fire, automobile, life, health, accident, disability, marine, surety, etc., etc. Also no professional examinations, as such were required or given the applicant, although he had to be vouched for by the insurance company for which he was employed (Calif. Statutes 1923, Chapter 355, page 731, Amending Calif. Political Code, Sec. 633).

Appellant's efforts to sell appellee's accident insurance policies were not very successful, and after a few months appellant quit actively to represent appellee and returned to his former line of business, going in business for himself, in the early part of 1927 (R117-118). Although he did not formally resign as appellee's agent until December 31, 1927, nevertheless he was giving practically all of his time to his own business (R118). Apparently, he was not the type that makes a real success of the insurance business (R118).

There is no evidence in the record that appellant ever wrote any life insurance policies for appellee while acting

as its agent prior to the issuance of the instant policy on December 31, 1926, although almost two years later (R103) and long after he had formally resigned as appellee's agent, appellant wrote a couple of life insurance policies on his own life (R103-104).

The Four Policy Loans—Policy Back at Home Office Each Time.

After the issuance of the present policy on December 31, 1926, appellant, in July, 1928, delivered the policy into the hands of appellee at its San Francisco Branch Office for the purpose of negotiating a further loan on it. The policy was then sent by the San Francisco Branch Office to appellee's home office at Hartford, Connecticut. After being in the home office for about a month, it was returned to appellant in August, 1928 (R55). In a similar manner and for the same purpose, the policy was back at appellee's home office again for about a month in September and October, 1931 (R56) and similarly, again in October and November, 1933 (R56), and similarly, again in June, 1936 (R56) (Finding XVI-R55-56).

The "Special Privileges" clauses (which form the basis of this litigation) and the "Cash and Loan Values, Paid-up and Automatic Term Insurance" tables, which appellee presumably used on all four occasions in making said loans, are both found on the same (second) page of the policy (R33).

QUESTIONS PRESENTED

1. Is the appellee estopped by laches from maintaining this action?

2. Does the California Statute of Limitations (Code of Civil Procedure, Sections 312 and 338) apply by analogy

and bar the bringing of the present action on the policy? and,

3. Does the "Incontestable Clause" of the policy apply to and bar the present suit brought for the first time almost 20 years after its issuance, to reform the policy and pay only half the benefits called for in the policy, as issued?

STATEMENT OF POINTS

(R. 132-133-134)

The District Court erred in:

1. Finding that appellee was not guilty of laches.

2. Finding that the California Statute of Limitations did not apply.

3. Finding that the "Incontestable Clause" did not apply.

4. Finding that appellee only "discovered" the claimed error for the first time in 1946.

5. Ordering judgment for appellee, after finding that appellee had the policy in its possession, four different times namely in 1928, 1931, 1933 and again in 1936, but only "discovered" the claimed error in 1946.

6. Finding that appellant was not prejudiced by this action to reform the policy brought almost 20 years after its issuance, after appellant had paid to appellee all 20 of the annual premiums demanded, and appellant was virtually 65 years of age and obviously uninsurable, and

7. The policy was issued through mutual mistake of the parties.

THE "INCONTESTABLE CLAUSE"

Pleaded as an affirmative defense in our answer and counterclaim (R27) reads as follows:

"*Incontestability.* This contract shall be incontestable after one year from date of issue, except for non-payment of premiums * * *

* * * This contract is subject to the privileges and conditions recited on the subsequent pages hereof" (R27, 7).

ARGUMENT

The Present Action Is Barred by Laches.

Under the settled rule, this present action to "reform" the policy 20 years later is now barred by laches. The established rule is well stated by Mr. Circuit Judge Sanborn in *Kelly v. Boettcher,* 85 Fed. 55, where, at page 62, it is said:

> "When a suit is brought within the time fixed by the analogous statute, the burden is on the defendant to show, either from the face of the bill or by his answer, that extraordinary circumstances exist which require the application of the doctrine of laches; and, when such a suit is brought, after the statutory time has elapsed, the burden is on the complainant to show, by suitable averments in his bill, that it would be inequitable to apply it to his case. The cases of *Wagner v. Baird,* 7 How. 234; *Godden v. Rummell,* 99 U.S. 201; *Wood v. Carpenter,* 101 U.S. 135, 139; and *Rugan v. Sabin,* 10 U.S. App. 519, 3 C.C.A. 578, 582 and 53 Fed. 415, 420, belong to the class of cases in which the doctrine of laches was applied after the statute of limitations had run."

The "analogous statute," pleaded in our answer (R26) is found in Sections No. 312 and No. 338, of the Code of Civil Procedure of the State of California, the applicable parts of which read as follows:

Sec. # 312. *"Civil Actions*—Civil Actions, without exception, can only be commenced within the periods prescribed in this title, after the cause of action shall have accrued," and

Sec. #338. *"Three Years * * * Fraud and Mistake* Within Three Years:

* * * 4. An action for relief on the ground of fraud or mistake. The cause of action in such case not to be deemed to have accrued until the discovery, by the aggrieved party, of the facts constituting the fraud or mistake."

The trial court in Findings XVI (R55) states that appellee's first knowledge of the claimed error was in March 1946, notwithstanding that in said Finding the Court also finds that appellee had the policy in its possession in 1926, 1928, 1931, 1933 and again in 1936. The "loan values" which the company presumably used in making said loans are found on the lower half of the same page (page 2) of the policy which contains the "special privileges" which appellee now contends were issued by mistake. A corporation, of course, can only act through its servants and agents. On each of the four occasions when the policy was submitted to appellee by appellant in connection with these loans, had the Company's servants who read the "loan values" raised their eyes to the upper half of the same page, they would have discovered the now claimed error.

That the appellee, after being guilty of such undeniable, unexplained and repeated acts of negligence, should now be allowed to profit by its unquestioned acts of carelessness and omission, presents an untenable theory of law and fact that should receive no consideration in this

court. We submit the trial court's findings in this respect are contrary to the admitted facts in the case, and find no support in the evidence.

> "Where there are irreconcilable findings upon a material issue, an appellate court can do nothing but reverse."
>
> *Calvert v. Stoner,* 84 A.C.A. 228 (Calif. Dist. Ct. of appeals).

The admitted facts clearly show that appellee knew or should have known as early as 1928, but certainly as late as 1936, that such mistake, if any, was made. Waiting thereafter 10 years before asserting such claimed error is unreasonable. It should now be held by this court that the California Statute began to run at least in 1936 when the company made the fourth loan on the policy. For obviously means of discovery is equivalent to discovery.

The facts in *Yablon v. Metropolitan Ins. Co.,* 200 Georgia 693, 38 S.E.(2d) 534, are strikingly similar to the facts in the case at bar. There the Supreme Court of Georgia, at page 543, said:

> "Has the defendant been guilty of laches to the extent that it would now be inequitable to allow reformation? Unquestionably the evidence did not justify the direction of a verdict that the company had been so guilty. The record shows that the defendant has waited from November 6, 1922, to February 11, 1942, to assert its right for such equitable relief. In the meantime, it has collected all of the premiums fixed by it as due, and frequently has had actual possession of the policy, with ample opportunity to examine it; the insured has grown old and become totally disabled, making it now impossible for him

to secure the type of insurance which he insists that he requested."

and again, on page 544, the same court said:

"It was not shown by any evidence that the insured had any knowledge of or connived in any way with the insurer for the stated premium rate in the rider, providing that payment for total and permanent disability would be lower than the prescribed rate applicable to other persons. In the absence of such showing, we do not think that the insurer, approximately 19 years after the issuance and delivery of the policy and rider, and on its action to reform the contract for alleged mistake, could lawfully contend that it was not liable because the rate of premium which the company inserted in the face of the rider was lower than its rate-book schedule for such protection, and because this would be a discrimination. The defendant will not now be allowed to benefit by its own wrong, in which the plaintiff was not likewise a wrongdoer."

Section #3527 of the Civil Code of California provides:

"The law helps the vigilant before those who sleep on their rights."

That it is the duty of one executing a contract to read it, is, of course, elementary. In 32 Corpus Juris, p. 1142, Sec. 249, 44 C.J.S., Insurance, Sec. 279, it is stated:

"A court of equity usually will not reform a policy in order to relieve a party from a mistake which was the result of his own negligence." See also *Yablon v. Metropolitan Life Insurance Co.*, supra, and cases cited; and it has even been held that the wrongful conduct of a scrivener, who did not write the con-

tract as instructed, will not relieve the party who directed its preparation, but who failed, through his own negligence, to read it before sending it to the other party, who in good faith accepted it and acted upon it. *Newsome v. Harrell,* 146 Ga. 139, 147; 90 S.E. 855."

"The company is bound to know the provisions of its own policy, and must move promptly in order to obtain a correction."

32 Corpus Juris 1142.

"Those who suffer in consequence of their own culpable inertness are without remedy."

Natl. Union Fire Ins. Co. v. John Spry Lumber Co., 235 Ill. 98, 85 N.E. 256, 259.

If there was a mistake, as appellee claims, had the officers of appellee read the policy, it is reasonable to suppose they would have discovered the error, if not in 1926, then in 1928, 1931, 1933 or 1936. And if one signs a written contract without acquainting himself of its contents, he is estopped by his own negligence to ask relief from his own obligation, if there is no fraud or artifice in procuring his signature, or, putting it another way, one having the capacity and opportunity to read a contract who executes it without reading it, in the absence of fraud or imposition or special circumstances excusing his failure to read it, is charged with knowledge of its contents and cannot avoid the contract by asserting that it did not express what he intended. See *Upton, Assignee v. Tribilcock,* 91 U.S. 45, 50 L. Ed. 203; *Whitney Co. v. Johnson* (C.C.A. 9th) 14 Fed.(2d) 24, 25; *Hayes v. Travelers Ins. Co.,* 93 Fed.(2d) 568, 570 (C.C.A. 10th); *Wagner v. Natl. Life Insurance Co.* (C.C.A. 6th) 90 Fed. 395, 407.

In *Metropolitan Life Ins. Co. v. Asofsky,* (D.C. N.J.) 38 Fed. Supp. 464, it was held that the insurer's failure to check premiums stated in the policy or by other means to discover its error during two months and ten days before delivery of the policy to insured prevented the insurer from having policy reformed.

We think this rule should apply to and be equally binding upon an insurance company and a policyholder alike.

There is in the instant case no claim or suggestion that the appellant Richardson practiced any fraud or artifice, either in connection with the original issuance of the policy, or in connection with any of the four policy loans when the policy was back at appellee's home office. Likewise it is not claimed by appellee that appellant had any knowledge of or connived in any way with the appellee insured for the stated premium rate on the rewritten 1926 policy. In the absence of such showing we do not think that the appellee insurer in its present action to now "reform" the contract, can lawfully and reasonably contend that it is not liable because the rate of premium which the company inscribed in the face of the policy was lower than its 1916 rate-book schedule for such protection. We feel the appellee should not now, at this late date, be allowed to benefit (by collecting all the premiums) from its own wrong in which the appellant was admittedly not likewise a wrongdoer.

The burden of proving and establishing a mutual mistake, or the mistake of appellee coupled with fraud or inequitable conduct on the part of appellant, was clearly on appellee. This burden must be met by establishing it by evidence of the clearest, unmistakable and most satisfactory character. A mere preponderance of the evidence

is not sufficient to satisfy the burden of proof. The evidence must establish the proof virtually beyond a reasonable doubt. See *Hayes v. Travelers Ins. Co.,* supra, and other cases therein cited.

In *Dutton v. Prudential Ins. Co.,* (Mo.) 193 S.W.(2d) 938 the Supreme Court of Missouri, at page 943, says:

> "It has been held by our courts in many cases that to justify the reformation of such an instrument as we have before us (insurance policy), on the ground of mutual mistake, the evidence of such mutual mistake must be 'so clear, convincing and complete as to exclude all reasonable doubt in the chancellor's mind,' and that 'a mere preponderance of the evidence is not sufficient.' Furthermore, courts of equity do not grant reformation on 'probability' or even the mere preponderance of the evidence, but only on 'certainty of error.' *Employers' Indemnity Corporation v. Garrett, et al.,* 327 Mo. 874, 38 S.W.(2d), 1049, 1055; *Stubblefield v. Husband,* 341 Mo. 38, 105, S.W.(2d) 419."

The policy here was executed by the President and Assistant Department Secretary of appellee Insurance Company. Appellee claims, and the trial court found that the policy as written provides for cash benefits at age of 65, of $1,083, per $500 of insurance, instead of $1,083 per $1,000 of insurance.

Although the trial court, in its "Opinion and Order" (R41), says that plaintiff alleges, and the court finds, that it erroneously selected the wrong printed form of policy, etc., there is not even a scintilla of evidence to this effect in the record. There is nothing more than an implication that the premium stated in the policy as issued was not

according to the 1916 rate manual. We search the record in vain for even a suggestion as to why or under what circumstances the mistake, if it was indeed a mistake, actually occurred. There is no substantial evidence in the record that the wrong printed form of policy was selected, no substantial evidence that a scrivener actually made a mistake. We submit that the implications and inferences to this effect are at best but weak suggestions that the Company might have wished to issue another type of policy. No explanation as to just how this "mistake" came about, if such it was.

Certainly this does not meet the burden of proof and constitute the "clear and unmistakable" evidence required to establish reformation of an insurance policy, especially after the maturity of the policy, when after a lapse of 20 years, the insured had become 65 years of age and obviously uninsurable and after the insured has performed all of his part of the insurance bargain.

Frankly, we do not think there was any mutual or other mistake in issuing the policy, but refrain from arguing the point only in view of the adverse findings of the trial court.

But even assuming, without admitting, that there was a mistake, the insurer should not at this late date be allowed to come into court, and now seek to be relieved from the natural consequences of its own negligent acts in not discovering what it now contends is an obvious error in the policy. No mistake on the part of the insured has been shown and the plaintiff insurer has not even charged the insured with any fraud in connection with the transaction. See *Hayes v. Travelers Insurance Co.,* supra;

Dutton v. Prudential Ins. Co., supra; and *Yablon v. Metropolitan Life Ins. Co., supra,* quoted above.

In *Kaufman v. New York Life Insurance Co.,* 315 Pa. 34, 172 Atl. 306, the mistake was even more pronounced than in the present instance. There, the insurance company also claimed that it made a mistake in issuing the policy. The facts are quite similar to the facts in the case at bar. The court there denied reformation upon much stronger evidence than appellee here produced in the trial court.

In the instant case there was definitely no mutual mistake of the parties. It is our contention that the policy was issued by one party in accordance with the understanding of the other party. If a mistake did actually occur, it was at most unilateral on the part of the insurer and was its own negligent fault. Had the insurer company in 1928 (a year and a half after it rewrote the insured's policy) exercised even the slightest care and diligence in reading the upper half of page 2 of the policy, and discovered then what it now claims is an obvious error, it could have then notified the insured and this lawsuit would never have been necessary. At any rate, a mistake, if made by the insurer, does not bind this innocent insured as the above quoted cases clearly show.

Appellee admits and the trial court so found that appellee kept no copy of this insurance contract which it entered into with appellant (R81, Finding VI—R52). In this day and age of widespread and inexpensive photostatic copying of documents, it is earnestly submitted this, in itself, constitutes a circumstance of negligence on the part of appellee.

The Insured Was Prejudiced.

The prejudice to the insured, we think, is so obvious as to call for little more than a mere statement of the facts as set forth above. Where an insured who is now 65 years of age and obviously uninsurable, as a result of conversations had with an official of the insurer, drops $25,000 of life insurance protection to take out the present policy—certainly he will have been prejudiced and harmed if the insurer here is now allowed to prevail in its present contention. See *Yablon v. Metropolitan Life Ins. Co.,* supra; *Hayes v. Travelers Ins. Co.,* supra; *Kaufman v. New York Life Insurance Co.,* supra.

The California Statute of Limitations (C.C.P. Secs. 312 and 338) Applies by Analogy.

Under the "Conformity Act" (28 U.S. Code #724) and Rule 43A and Rule 81 of the Federal Rules of Civil Procedure, and the decisions construing the same, the Federal Courts normally apply the State Statutes and the decisions in the States where the Federal Courts sit. This applies to equity cases as pointed out above. See *Kelly v. Boettcher,* supra; *Wagner v. Baird,* supra; *Godden v. Rummell,* supra; *Wood v. Carpenter,* supra; *Rugan v. Sabin,* supra, cited above. See page 7 of this brief.

The Incontestable Clause Does Apply.

The incontestability clause in the policy reads as follows:

> "*Incontestability.* This contract shall be incontestable after one year from date of issue, except for non-payment of premiums. It is free from conditions as to residence, occupation, travel or place of death. No permit or extra premium will be required for

military or naval service in time of war or in time of peace.

"This contract is subject to the privileges and conditions recited on the subsequent pages hereof."

We can think of no better or more logical application of the incontestability clause of an insurance policy than in the present instance. For had the insurer company within a reasonable time after writing the policy or within a reasonable time after discovering this alleged "mistake," in 1928 or 1931 or 1933 or 1936, notified the insured, he could then at his age at that time have taken out other insurance or have been reinstated in his former $25,000 policies. For certainly, incontestable clauses in insurance policies must have been intended to be something more than mere "bait" to entrap credulous, naive and unwary buyers of life insurance. The history of such clauses is well known.

It has been said that the incontestable clause may properly be regarded as a most important, if not *the most* important, provision in a life insurance policy. While each part of a life insurance policy is of course important, and has its function, the incontestable clause has its influence over the other portions of the policy.

The courts have said that where a policy contains such a clause, it is, in effect, one kind of a policy, before the expiration of the contestable period, and a different and more valuable policy thereafter.

See:

Bernier v. Pac. Mut. Life Ins. Co., (Louisiana) 139 So. 629;

Mutual Reserve Fund v. Austin, 142 Fed. 398, 6 L.R.A. N.S. 1064.

The general and almost universal rule in the United States is laid down in *Dibble v. Reliance Life Ins. Co.*, 170 Cal. 199. This case has now become one of the leading cases in the country and has been widely cited by State and Federal Courts.

The rule as there stated by the Supreme Court of California, per Mr. Chief Justice Angelotti, is that an incontestable clause (after expiration of the contestable period) bars and precludes *every* defense to or any contest of the policy on any ground which is not specifically reserved or excepted in the incontestable clause itself.

In that case the company defended on the grounds that there were false statements or representations in the application for the policy, and filed a cross-complaint, seeking cancellation of the policy. The insured contended that such defense was barred by the incontestable clause in the policy. The company, at the same time, contended that for the court to so hold would be against public policy, and in violation of the provisions of section 1668 of the Civil Code, as exempting the insured from responsibility for his own fraud. The Supreme Court followed the general rule hereinbefore set out, and held that fraud as a defense was barred by the incontestable clause, and that to so hold would not violate public policy, as condoning fraud, but, on the contrary, it recognizes fraud and all other defenses, by providing ample time and opportunity within which they may, and after which they may not be asserted.

The court stated that incontestable clauses are in the nature of and serve a similar purpose as statutes of limitation and repose, and that the parties to a contract may provide for a shorter limitation then that fixed by

law, and that such an agreement is in accord with the policy of statutes of that character. The court further made reference to and invoked the well-settled rule that in construing the provisions of a policy, all doubts and ambiguities must be resolved against the insurance company.

See:

Narber v. California Life Ins. Co., 211 Cal. 176.

Attention is invited to the first sentence of the clause, namely: "This *contract* shall be incontestable after one year from date of issue (in this case December 31, 1926), except for non-payment of premiums," (italics ours), the *only* exception being the non-payment of premium. The plaintiff insurer admits in its complaint that all premiums have been paid.

In *Dibble v. Reliance Life Ins. Co.,* supra, the opinion, prepared originally by Mr. Justice Burnett of the California District Court of Appeal of the Third District and adopted in part by the California Supreme Court, it is said:

> "It may be added that the subject is thoroughly considered in the note to *Clement v. New York Life Ins. Co.,* as reported in 42 L.R.A. 247, and I think the statement is justified that all the recent cases and authorities hold that where a reasonable time is given for investigation an incontestable clause is valid as against all defenses not excepted from its operation.
>
> "And in this connection it may be said that I can find no warrant for the assertion that by the terms of the policy here *fraud* is withdrawn from the application of said provision.

> "There is no contention that *fraud* is *expressly* excepted and I think there is no such implication. As I understand it, the clause in which the term is used simply implies that in case of fraud the statements made in the application shall be deemed *warranties,* but there is nothing to suggest that a defense on said ground is not barred by the lapse of the time period prescribed."

The Right to "Reform" the Policy Is Not Excepted in the Incontestable Clause of the Present Policy.

Certainly, it must necessarily follow that if an insurance company can waive and except itself from the defense of gross fraud on the part of the *insured,* it should be able to correspondingly waive and except itself from defending suit on the policy (our counterclaim) based upon its own negligence. Especially where its defense and contest of one-half the policy involves a totally innocent policyholder who in good faith performed his part of this insurance bargain by paying *all* premiums in full.

Regarding the company's attempted defense and cross-complaint to cancel the policy, the Supreme Court of California, in *Dibble v. Reliance Life Ins. Co.,* supra (page 206) states:

> "To hold otherwise would be to permit such a clause in its unqualified form to remain in a policy as a deceptive inducement to the insured."

We respectfully submit that anyone who has ever been solicited to buy a life insurance policy, and mentioned to the agent, the possibility of lawsuits in connection with life insurance policies, can really appreciate just what the Court was referring to when it used the language above quoted.

Regarding the insurance company's defense that the insured was a trusted employee of the company, the court, at page 204, said:

> "Nor can I see that the legal aspect of the situation is changed by the circumstance that the insured was a trusted employee of the company. As far as the policy itself is concerned, the parties sustained the same relation as in the ordinary case of life insurance. The company would certainly have the right to grant to its employees the same favor as to strangers and it should be bound by the same obligations. Indeed, as far as opportunity for inquiry and investigation to ascertain fraud is involved in the question, there is reason for holding the insurer to a stricter accountability where an employee is the insured."

Mr. Chief Justice Angellotti, in his opinion, quotes from *Wright v. Mutual Benefit Assn,* 118 N.Y. 237, 16 Am. St. Rep. 749, 6 L.R.A. 731, 23 N.E. 186, as follows:

> "It is not a stipulation absolutely to waive all defenses and to condone fraud. On the contrary, it recognizes fraud and all other defenses but it provides ample time and opportunity within which they may be, but beyond which they may not be, established. It is in the nature of and serves a similar purpose as statutes of limitations and repose, the wisdom of which is apparent to all reasonable minds. It is exemplified in the statute giving a certain period after the discovery of a fraud in which to apply for redress on account of it and in the law requiring prompt application after its discovery if one would be relieved from a contract infected with fraud. The parties to a contract may provide for a shorter limitation than that fixed by law and such an agreement is in accord with the policy of statutes of that character."

In *Reliance Life Ins. Co. v. Thayer,* 84 Okla. 238, 203 Pac. 190, 192, the court, in passing on the validity of an incontestable clause, said:

> "Webster's International Dictionary defines these words as follows:
>
> " 'Contest: Earnest struggle for superiority, defense, victory, etc.; competition; emulation; strife or argument.' "

In the present action under Webster's definition, the appellee certainly is making a contest of the policy in resisting payment of the full amount stated in the policy.

The language of the policy is indeed clear and unmistakable—no ambiguity whatever exists—the policy on page 2 reading in part as follows:

> "Options available at age 65. The insured may select in lieu of all other benefits hereunder one of the following options to become available upon the surrender of this contract at its anniversary when the insured shall have reached the age of 65, the amount of these options being stated for each $500 of insurance.
>
> 1. Receive a cash payment of $1,083.00.
> 2. Receive a cash payment of $739.00 and a paid-up contract payable at death for $500.00.
> 3. Receive a paid-up contract payable at death for $1,574.00.
> 4. Receive an annual income of $112.83 payable during the natural life of the insured."

Appellee's present action is clearly an "earnest struggle for superiority" in attempting to pay only one-half of the amount called for in the policy and its present action under the form of an action to "reform" the contract

of insurance, as well as its defense of our counterclaim, is undeniably a "defense" to our counterclaim; and for the same reason appellee's present action certainly is an "earnest struggle for victory"; also a "competition" with the appellant for one-half the amount plainly stated in the policy; its present action is clearly both "strife" and "argument" with the appellant over his right to recover the full amount stated in the policy. In other words appellee, in resisting payment of the full amount stated in the policy, comes clearly within Mr. Webster's definition above quoted. The limitation contracted for in the policy (incontestable clause) is one year. The year ended on December 31, 1927 and the company's right to reform the policy or otherwise resist payment of the amount clearly stated in the policy (except for non-payment of premiums), expired on that date. Its present action filed in August, 1946—18½ years after—comes too late.

The policy having been submitted to the appellee insured by appellant, on the four occasions when appellant secured loans on it, we think the fact that appellee made no effort to change the policy or correct any error in it, is strong evidence that it considered that no error existed. Commenting on a somewhat similar situation, the Supreme Court of Missouri, in *Dutton v. Prudential Ins. Co.,* supra, at page 944, says:

> "The testimony of Mr. Haley that he saw the insured almost every week after the delivery of the policy and that the insured never at any time expressed any dissatisfaction with the policy, and did not make any claim of mistake in the policy, is strong proof that the insured did not believe there was any mutual mistake in the policy as written. Furthermore, the

> fact that the insured accepted the policy and kept it for more than one year prior to his death without objection to any of its terms or conditions, gives rise to a presumption that the contract as written sets forth fully and correctly the true agreement of the parties'' (citing authorities).

Indeed if appellant had in fact possessed the improper motive to gain more than he bargained for, evidently imputed to him by the trial court in its opinion, it seems to us highly improbable that he would have risked discovery by voluntarily submitting the policy to the company so soon (1928) after its issuance on December 31, 1926.

This court, per the late Mr. Circuit Judge Rudkin, one of the ablest and most distinguished judges ever to have sat upon the bench, in *Chun Ngit Ngan v. Prudential Ins. Co.,* 9 Fed. (2d) 340, 341, said:

> ''The overwhelming weight of authority supports the rule that the incontestible clause commonly found in life insurance policies is in effect a short period of limitations, and that a policy can only be contested within the meaning of the clause by proceedings in court to which the insurer and the insured or his representative or beneficiary are parties'' (citing cases).

In *Columbia National Life Ins. Co. v. Black,* 35 Fed. (2d) 571 (C.C.A. 10th), it is held that the incontestable clause does not apply to a suit to reform an insurance policy. We submit that a careful reading of the opinion in that case discloses that the holding does violence to the plain wording of the language employed in the policy as well as violence to the ordinary and accepted mean-

ing of those words as defined by Webster and the courts. It is unnecessary to cite authorities to the effect that words in an insurance policy are to be given their ordinary and usual meaning, and in case of ambiguity, are to be construed against the insurer and in favor of the policy holder.

The Trial Court's Opinion.

The trial court in his opinion uses almost the identical argument set forth in appellee's counsel's brief. By way of explanation as to why appellee did not "discover" the claimed error when it had the policy four times in its possession in 1928, 1931, 1933 and 1936 the opinion says:

> "By way of explanation as to why plaintiff did not discover the error on the other times that the policy was in its possession, the testimony indicates that when the policies were received they were referred to a department of the plaintiff which checks merely upon the cash or loan value and registers the assignment for the purpose of the loan. It is shown that that department has no connection with the issuing department or the policy writing department and that the table of loan values was correct for the insurance annuity policy and that there was no occasion in making loans on the policy, to refer to the special provisions of the policy where the error was located." (R42, 43)

Yet further on in its opinion the court argues that appellant *must* have been cognizant of a mistake in the issuance of the policy, the court saying:

> "It is incredible that defendant did not familiarize himself with the special privileges" (R45, 46) and "I am satisfied that he read these provisions and,

if he did read them he must have realized that a mistake had been made." (R46)

Just why such a high degree of knowledge of all phases of the insurance contract was expected of appellant and not of the appellee insurer, with its legions of technical insurance experts, we are unable to discern. At any rate the speculative inference that appellant *must* have read his policy at the time it was issued, certainly falls far short of constituting the "clear, convincing, and unmistakable evidence beyond a reasonable doubt" required to "reform" a policy of life insurance—especially 20 years after it was issued.

The distinguishing characteristics between *Columbia Natl. Life Ins. Co. v. Black,* supra, and the instant case is that in that case, the company within a relatively short time after the issuance of the policy wrote the insured and called attention to the mistake and demanded the policy be surrendered to it for correction. *But that is not this case,* where the appellee first demanded the policy be reformed in March, 1946, almost 20 years after its issuance and almost 19 years after the right to contest it had expired under the incontestable clause.

In *Kaufman v. New York Life Ins. Co.,* supra, the Supreme Court of Pennsylvania, beginning at page 307, distinguishes *Columbia Natl. Life Ins. Co. v. Black,* supra, and most of the other cases cited by counsel in his briefs in the lower court.

CONCLUSION

As appellee (1) failed to prove its right to a reformation of the policy by the "clear unmistakable and unequivocal evidence beyond a reasonable doubt" as required by the rule, and, (2) was guilty of inexcusable negligence and laches in not discovering the claimed error at least in 1936 after having previously had five clear opportunities to do so, and, (3) failed to bring the present action to reform within a reasonable time, and, (4) failed to bring the present action within the three years required by the California Statute of Limitations, and, (5) failed to bring the present action within the one year allowed by the policy to contest it, it is respectfully submitted that the judgment of the lower court should be reversed and judgment entered for appellant for the full amount stated in his policy.

Dated: San Francisco, California,
September 20, 1948.

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